

CECIL McCANDLESS ET AL.

IBLA 81-419

Decided May 10, 1982

Appeal from decisions of New Mexico State Office, Bureau of Land Management, cancelling cooperative agreements for private maintenance of wild free-roaming horses. NM 931-81-1WH.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wild and Free-Roaming Horses and Burros -- Rules of Practice: Appeals: Burden of Proof -- Wild Free-Roaming Horses and Burros Act

A decision cancelling a cooperative agreement for private maintenance of wild free-roaming horses will be affirmed on appeal where the record indicates the horses were commercially exploited as rodeo bucking stock in violation of the cooperative agreement and the relevant regulations.

APPEARANCES: Cecil McCandless, pro se, and for the other appellants; Gayle E. Manges, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Cecil McCandless has appealed on his own behalf and on behalf of 12 other individuals 1/ from decisions of the New Mexico State Office, Bureau of Land Management (BLM), dated December 1, 1980, cancelling cooperative agreements for the private maintenance of 52 wild free-roaming horses. The basis for cancellation was appellants' alleged commercial exploitation of the assigned horses and, in some cases, their failure to report the death of assigned horses.

1/ The other individuals involved in this appeal are: Jeanne Bell, Imogene Hager, Dana Haralson, Leonard Haverkamp, Brenda Lively, Benny E. Loera, Rebecca Loera, John T. McCandless (deceased), Mary McCandless, Minnie McCandless (deceased), Clifford C. Richardson, and Nelline R. Richardson.

Appellants were assigned four horses each under cooperative agreements issued pursuant to the Act of December 15, 1971, as amended, 16 U.S.C. §§ 1331-1340 (1976 and Supp. IV 1980). The agreements were all signed for the appellants by Cecil McCandless, by virtue of a power of attorney from the other appellants, and dated April 24, 1979. The agreements indicated that the horses were "available for private maintenance in accordance with 43 CFR 4740.1 and 4740.2(b) [(1979) (now 43 CFR 4740.1 and 4740.4-2)]." They also provided that "[n]one of these animals * * * may be * * * used in any way for commercial exploitation" and that on the death of any assigned horse, the BLM State Office must be notified. The agreements also provided that they would "remain in full force and effect until * * * (2) this agreement is terminated by an Authorized Officer of the Bureau of Land Management after due notice in writing because of assignee's default or violation of any of the terms or provisions of this agreement."

By letter dated January 2, 1980, from the Director, Denver Service Center, BLM, appellants were informed that they might obtain title to the assigned horses upon application, if certain conditions were met:

The Bureau expects to begin title transfers soon, probably in March or April. At that time, if you have maintained an animal under a Cooperative Maintenance Agreement for 12 or more consecutive months, you will receive an official Application for Title to be completed and returned to BLM. We will require that your application be accompanied by a licensed veterinarian's statement certifying that the animal is in good health.

After your application has been processed, you will be sent a Certificate of Title for your animal. This official certificate from the U.S. Department of the Interior will be your legal title to the animal. It should be kept available for inspection during the time you own the animal.

We remind you that until you receive your Certificate of Title, your adopted horse or burro is still property of the U.S. Government and protected under various Federal laws and regulations. Some of these are listed on the Cooperative Maintenance Agreement you signed when you obtained the animal. We urge you to reread your agreement and make sure you are complying fully with its terms.

There are other more recent regulations of which you should be aware.

* * * * *

Further, it is illegal * * * to use an adopted animal for bucking stock or similar events that rely on the animal's wild characteristics.

The file contains a report of a telephone conversation dated April 18, 1980, between appellant Cecil McCandless and Bill W. Sharp, a BLM employee, in which McCandless inquired when appellants would get title application

forms. The report indicates McCandless was again advised not to use the horses for bucking stock in conjunction with rodeos until he received title to the horses.

There is some question as to when appellants received the title application forms. In the statement of reasons for appeal, appellant Cecil McCandless states that the forms were received "in August, 1980." A memorandum from the Associate State Director, BLM, to the Field Solicitor, dated February 12, 1981, states that due to "unforeseen delays" the forms were not mailed "until the middle of May." A compliance check form in the case file signed by Robert Sellers, BLM Compliance Officer, dated October 14, 1980, indicates that the forms were mailed "on 6/6/80." In any event, there is no indication that title applications were ever filed by appellants.

The decision appealed from recites that on October 5, 1980, "wild horses with [BLM] freeze marks were observed by Mr. Sellers at the Forestburg, Texas, rodeo arena" in the custody of appellant Cecil McCandless. The decision further states that on October 9, 1980, appellant Cecil McCandless admitted to Sellers that he "had been bucking some of the wild horses."

By letter dated October 10, 1980, Robert L. Schultz, Chief, Branch of Biological Resources, BLM, informed appellant Cecil McCandless that BLM special agents would take possession of the remaining "50 wild horses" on October 14, 1980, pursuant to 43 CFR 4740.4-2(e). He stated: "In light of information received by [the] Bureau of Land Management (BLM) and pursuant to [a] conversation between you and BLM Compliance Officer Robert Sellers, these wild horses have been used for bucking stock at rodeos. This information confirms a violation."

On October 14 and 16, 1980, 38 horses were hauled by BLM from the Forestburg, Texas, rodeo arena to the distribution center at Valley Mills, Texas. The remaining 14 horses had apparently died. 2/

2/ A memorandum from the Associate State Director, BLM, to the Field Solicitor, dated Feb. 12, 1981, states that appellant Cecil McCandless

"did report at least nine horses dying. * * * Only four of the horses reported to us as dying are listed on our records. They are as follows: a. No. 79200374 Adopted by Cecil McCandless

b. No. 67200183 Adopted by Cecil McCandless
c. No. 75200409 Adopted by John T. McCandless
d. No. 79200371 Adopted by Minnie McCandless

Other horses that died but were either not reported by Mr. McCandless or were reported and not put on our records are as follows:

a. No. 65200410 Adopted by Jeanne Bell
b. No. 66200311 Adopted by Imogene Hager
c. No. 64200273 Adopted by Dana Haralson
d. No. 65200391 Adopted by Leonard Haverkamp
e. No. 65200315 Adopted by Brenda Lively
f. No. 67200405 Adopted by Benny Loera
g. No. 69200386 Adopted by Cecil McCandless
h. No. 72200389 Adopted by Mary McCandless
i. No. 75200416 Adopted by Minnie McCandless
j. No. 76200412 Adopted by Leonard Haverkamp"

Id. at 3.

In the statement of reasons for appeal, appellant Cecil McCandless admits that he "did start using the horses around the first of July." He states, however, that he had informed BLM "in the very first phone call I made to the BLM," that he intended ultimately to use the assigned horses as bucking stock and that after 15 months and repeated telephone calls in April and June 1980, in which he inquired about title application forms: "I told them then that I had to start using the horses as I had quite a large sum of money invested in feed, hay, grass, lease and etc." Appellant also states: "The BLM made an issue of finding the horses at the rodeo arena in Forestburg, Texas. Sir: That is where the horses were being kept and fed and watered ever since June, when all the grass in the pasture was gone, and all the water tanks were dry." With regard to the dead horses, appellant Cecil McCandless states that "[o]n numerous occasions I called Mr. Robert Sellers at the Santa Fe Office and told him of these deaths."

Before we reach the merits of this case, however, we must deal with two procedural matters. In its response to appellants' statement of reasons, the Office of the Field Solicitor moved to dismiss the appeal on the basis that Cecil McCandless was not qualified to practice before the Board under 43 CFR 1.3 and that, with respect to three of the appellants, Dana Haralson, Benny E. Loera, and Rebecca Loera, the notice of appeal was not filed timely under 43 CFR 4.411.

Each appellant's notice of appeal and one statement of reasons for all appellants was filed on behalf of all parties appealing by appellant Cecil McCandless. Accordingly, Cecil McCandless' qualifications to practice before this Board are germane.

Although an individual who is not an attorney at law may appear on behalf of a member of his family, such an individual may not ordinarily represent other individuals. 43 CFR 1.3. Moreover, the fact that Cecil McCandless obtained all of the horses on behalf of the others pursuant to a power of attorney does not qualify him to practice before this Board on their behalf. An appeal filed on behalf of another by an attorney-in-fact who is not himself qualified to practice before the Department is subject to summary dismissal. Haruyuki Yamane, 19 IBLA 320 (1975), aff'd sub nom. Burglin v. Secretary of the Interior, Civ. No. 77-1655 (9th Cir. Aug. 18, 1978). Nor does the fact that he is acting jointly with others give rise to an implication that he is acting as their partner or as an officer or full-time employee of an association of the parties. Id. Nevertheless, it is apparent that at least some of the parties represented by McCandless, if not all, are members of his family, on whose behalf he is entitled to appear. Since our decision on the merits of the appeal applies equally to all, it is not necessary to undertake to discover which of the parties, if any, are unrelated to Cecil McCandless either by consanguinity or affinity. Therefore, the motion to dismiss on the basis of McCandless' lack of qualifications to practice before the Board is hereby denied.

The motion to dismiss for failure to file timely the notice of appeal is also denied. The date on the notice of appeal indicates it was "probably transmitted" to the BLM State Office before the end of the period in which it was required to be filed. The date stamp on the notice of appeal indicates it was received within the 10-day grace period for filing. 43 CFR 4.401(a). Pursuant to 43 CFR 4.411(b), the delay in filing is waived.

[1] Accordingly, we reach the merits of the case. The Act of December 15, 1971, as amended, 16 U.S.C. § 1333(b)(2)(B) (1976 and Supp. IV 1980), provides for the control of an overpopulation of wild free-roaming horses on the public lands by the removal of excess animals for private maintenance under humane conditions and care. Congress amended section 3 of the Act of December 15, 1971, by enacting section 14(a) of the Act of October 25, 1978, P.L. 95-514, 92 Stat. 1808 (1978), which added a new authority for transfer of title to such animals from the Government to their adoptive owners, as follows:

(c) Title of transferee to limited number of excess animals adopted for requisite period

Where excess animals have been transferred to a qualified individual for adoption and private maintenance pursuant to this chapter and the Secretary determines that such individual has provided humane conditions, treatment and care for such animal or animals for a period of one year, the Secretary is authorized upon application by the transferee to grant title to not more than four animals to the transferee at the end of the one-year period.

16 U.S.C. § 1333(c) (Supp. IV 1980).

On August 15, 1973, the Department adopted regulations implementing the Act of December 15, 1971, which provided in pertinent part that placement of wild free-roaming horses in the custody of private persons "shall be made through cooperative agreements which shall include provisions to maintain and protect the animals and ensure that the animals will not be used for commercial exploitation." 43 CFR 4712.3-2 (1974). Effective April 6, 1976, the regulations were recodified and 43 CFR 4712.3-2 was redesignated 43 CFR 4740.2. 41 FR 9879 (Mar. 8, 1976).

On April 6, 1979, in order to implement the Act of October 25, 1978, supra, the Department proposed amendments to the regulations. 44 FR 20724 (Apr. 6, 1979). The proposed regulations provided that cooperative agreements would incorporate provisions "for proper maintenance of the animals and protection from inhumane treatment and commercial exploitation" and authorized BLM to take immediate possession of an animal "[i]f the authorized officer determines that an adopted wild free-roaming horse or burro is being commercially exploited, inhumanely treated, or treated in a manner that violates a provision of the cooperative agreement * * *." 43 CFR 4740.3-2(d) and (e) (44 FR 20726 (Apr. 6, 1979)). In addition, for the first time, the proposed regulations defined "commercial exploitation" to mean:

[U]sing a wild free-roaming horse or burro, because of its characteristics of wildness, for direct or indirect financial gain. Characteristics of wildness include the rebellious and feisty nature of such animals and their defiance of man as exhibited in their undomesticated and untamed state. Uses such as saddle or pack stock or other uses that require domestication of the animal are not commercial exploitation of the animals because of their characteristics of wildness.

43 CFR 4700.0-5(n) (44 FR 20725 (Apr. 6, 1979)). The preamble to the proposed regulations stated:

The term "commercial exploitation" has been defined in this proposed rulemaking to mean use of a wild free-roaming horse or burro, because of its characteristics of wildness, for direct or indirect financial gain. For instance, using these untamed animals in rodeos for bucking stock would be an example of commercially exploiting their characteristics of wildness. [3/ Emphasis added.]

44 FR 20725 (Apr. 6, 1979). The proposed regulations, cited above, were implemented effective on January 28, 1980. 44 FR 76982 (Dec. 28, 1979). 4/ Proposed regulations originally designated 43 CFR 4740.3-2 were redesignated 43 CFR 4740.4-2.

During the term of a cooperative agreement, the assignee is required to abide by its terms, including applicable regulations. The cooperative agreements, in the present case, provided that the agreement "shall remain in full force and effect until" the animals die, the agreement is terminated by the authorized BLM officer, or upon request of the assignee. Accordingly, appellants' cooperative agreements remained in full force and effect until December 1, 1980, when BLM cancelled them.

The applicable regulation, 43 CFR 4740.5, also provides that BLM "may grant" title to assigned horses to "qualified" assignees. 43 CFR 4740.5(a). "Qualified" assignees are defined as those "who have provided humane conditions, treatment, and care for the animals they have adopted * * * for at least one year under a cooperative agreement." 43 CFR 4740.5(b) (emphasis added). After the passage of 1 year, an assignee does not have a vested right to obtain title to the assigned horses; rather, he is merely eligible to apply for title. At that time, he must establish that he has provided "humane conditions, treatment and care," in order to establish his qualifications. Even after he has established his qualifications, the granting of title is discretionary with BLM. We note that 43 CFR 4740.5(a) provides that BLM "may" grant title to qualified assignees.

Until appellants received title to the assigned horses, they were required to abide by the terms of their cooperative agreements, including applicable regulations. Failure to abide therewith might properly result in cancellation of the agreement.

3/ The regulations specifically prohibit not only the use of a wild free-roaming horse for commercial exploitation, but the use of an animal "for bucking stock." 43 CFR 4760.2(f) and (h). Penalties are provided for violations of these provisions. 43 CFR 4760.2.

4/ Appellants' cooperative agreements were signed before the effective date of the regulations. However, 43 CFR 4740.4-2(g) provides that: "(g) Persons, organizations, or agencies who receive wild free-roaming horses or burros that have been previously transferred for private maintenance or adoption shall be subject to all the provisions of these regulations." (Emphasis added.)

As is evident from the discussion, supra, use of assigned horses for "bucking stock" falls within the definition of "commercial exploitation," for which cause BLM might properly seize the horses and cancel the applicable cooperative agreement. From the evidence in the record, we must conclude that appellants, in fact, used their horses for "bucking stock" and that BLM properly cancelled their cooperative agreements.

Appellant Cecil McCandless, who apparently had custody of all of the assigned horses, stated in an April 18, 1980, telephone conversation with Bill Sharp, a BLM employee, that "he had several rodeos contracted [for] and he needed to use the horses." On October 5, 1980, wild horses with BLM freeze marks were observed in appellant Cecil McCandless' custody at the Forestburg, Texas, rodeo arena. Subsequent thereto, McCandless admitted that he "had been bucking some of the wild horses." On appeal, he has done nothing to dispel this implication. In fact, appellant admitted that he did start "using the horses around the first of July." Accordingly, we must affirm the BLM decision cancelling the agreements for that reason.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

